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GENNEVA SDN BHD v. DATO' VENGADASALAM LETCHUMI KANDAN & ORS

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
AHMAD ZAIDI IBRAHIM JCA
B SM KOMATHY SUPPIAH JCA
[CRIMINAL APPEAL NOS: W-09-200-05-2022, W-09-201-05-2022, W-09-202-05-2022, W-09-204-05-2022 & W-09-205-05-2022]
4 JANUARY 2024

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Abstract – *The prosecution needs to prove two things before the forfeiture of a seized property can take place: (i) the property is in connection to the commission of an offence under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful*
D *Activities Act 2001; and (ii) no one else has a legitimate claim to the property. Once the prosecution meets both conditions, the court can issue a temporary order to seize the property and next, gazette a notice to alert any potential third party that the property is being held. Before the forfeiture of any property, the court must first hear from any third party*
E *that claims to have an interest in the said property; the third party must show cause as to why the property should not be forfeited. Once the court decides on the third-party claims, the preliminary forfeiture order can then be made final.*

F ***CRIMINAL LAW:*** *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Section 61 – Forfeiture – Public Prosecutor filed application at Sessions Court for forfeiture order – Sessions Court issued statutory notice, pursuant to s. 61, by way of Gazette, calling upon third parties who claim interest in properties to show cause why properties should not be*
G *forfeited – Third parties responded to statutory notice and Sessions Court dismissed forfeiture application by Public Prosecutor – Appeal to High Court – High Court remitted third parties' claims to Sessions Court for adjudication – Whether claims of third parties could only be adjudged by High Court if and when prosecution succeeds in forfeiture application – Whether incumbent upon High Court to deal*
H *with third parties' claims as prosecution's forfeiture application was dismissed by Sessions Court*

The Public Prosecutor had filed an application, at the Sessions Court, for a forfeiture order under s. 55 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('Act'), in respect
I of the appellant and four others. The Sessions Court issued a statutory notice, pursuant to s. 61 of the Act, by way of *Gazette*, calling upon third parties who claimed an interest in the said properties to show cause why the properties should not be forfeited to the Government. The respondents in these appeals

were the third parties who responded to the said notice and, along with the appellant, had filed affidavits to contest the application. The Sessions Court dismissed the forfeiture application by the Public Prosecutor. The Sessions Court further held that, in view of the dismissal, s. 61 of the Act did not empower it to adjudicate the respondents' claims. This prompted the respondents to lodge their respective appeals, to the High Court, against the Sessions Court decision. The High Court: (i) found that the Sessions Court had not decided on the respondents' claims and did not specify whether the claims were allowed or dismissed; (ii) remitted the respondents' claims to the Sessions Court for adjudication; (iii) dismissed the respondents' appeals without prejudice to their right to re-file an appeal against the Sessions Court's decision in respect of their claims; and (iv) stayed the prosecution's appeal until the respondents' claims were adjudicated by the Sessions Court. Hence, the present appeal. In support of its appeal, the appellant submitted that: (i) under s. 61 of the Act, the court was required to adjudge the claims of third parties only if and when the prosecution succeeds in its forfeiture application; (ii) as the prosecution's forfeiture application was dismissed by the Sessions Court, it was not incumbent upon the court to deal with the respondents' claims; and (iii) the High Court erred in remitting the respondents' claims to the Sessions Court for adjudication when the prosecution failed to prove that the subject matter of the forfeiture application were forfeitable properties.

Held (allowing appeal)
Per SM Komathy Suppiah JCA delivering the judgment of the court:

(1) No order of forfeiture could be made until the claims of third parties, to the seized properties, are heard. To establish its rights to forfeiture, the prosecution must first prove that the properties it seeks to forfeit are forfeitable properties, namely that they are the subject matter or evidence relating to the commission of the offence under s. 4(1) of the Act. It is only upon the prosecution establishing that the seized properties are forfeitable properties that the court can enter a preliminary forfeiture order. It is only upon the making of the preliminary forfeiture order that the court is required to publish the requisite notice in the *Gazette*, under s. 61(2) of the Act, to commence the ancillary proceedings to determine the rights of the third parties to the forfeited properties. This stands to reason as it could not be gainsaid that it would be an absolute waste of judicial time if the forfeiture application and the claims of the third parties are heard simultaneously and, at the conclusion of the proceedings, it is found that the properties are not forfeitable properties. The Government does not have a clear title to the property until the ancillary proceedings under s. 61 of the Act is concluded. It is only upon the adjudication of the third-party claims that the preliminary forfeiture order could be made final. (paras 18-20)

(2) The court was unable to share the High Court's view that the Sessions Court ought to have proceeded with the ancillary proceedings in respect of the respondents' claims on dismissing the forfeiture application. The High Court erred in holding that the ancillary proceedings, under s. 61 of the Act, was separate and independent from the forfeiture application. The mechanics of the ancillary proceedings must follow the procedure laid down in ss. 55, 56 and 61 of the Act. (para 21)

(3) The order of the High Court, to remit the respondents' claims to the Sessions Court, was set aside. The respondents' appeals were reinstated. The High Court was directed to first hear the prosecution's appeal against the dismissal of its forfeiture application by the Sessions Court. If the said appeal is dismissed and the decision of the Sessions Court is affirmed, it would follow that the respondents' appeals would fail without prejudice to the respondents' rights to institute separate civil proceedings against the appellant in respect of their respective legal rights to the properties in question. However, if the appeal is allowed, then the respondents' claims would be remitted to the Sessions Court for adjudication in accordance to the provisions of the Act. (para 22)

Case(s) referred to:

Azmi Osman v. PP & Another Appeal [2015] 9 CLJ 845 CA ***(refd)***
PP v. Mohd Bakri Samsu & Anor [2016] 5 CLJ 824 HC ***(refd)***
PP lwn. Taiko Fertiliser & Yang Lain [2019] 4 CLJ 480 CA ***(refd)***
PP v. Thong Kian Oon & Ors [2012] 8 CLJ 119 HC ***(refd)***
Tetuan Wan Shahrizal, Hari & Co v. PP [2023] 4 CLJ 843 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing And Proceeds Of Unlawful Activities Act 2001, ss. 4(1), 55, 56(1), 61(2)
Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, s. 325

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[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Trial Nos: WA-42(Ors)-17-09-2021, WA-42(Ors)-24-09-2021, WA-42(Ors)-25-09-2021, WA-42(Ors)-27-09-2021 & WA-42(Ors)-29-09-2021 (overruled).]

Reported by Najib Tamby

JUDGMENT

SM Komathy Suppiah JCA:

Introduction

[1] The primary issue in these appeals concerns the rights of third parties to adjudicate their claims under s. 61 of the Anti-Money Laundering, Anti-Terrorism, Financing And Proceeds Of Unlawful Activities Act 2001 ("the Act").

Background Facts

[2] In 2019, the Public Prosecutor filed an application for a forfeiture order under s. 55 of the Act in respect of properties seized from the appellant and four others. Thereupon, the Sessions Court issued the statutory notice under s. 61 of the Act by way of *Gazette* calling upon third parties who claimed an interest in the said properties to show cause why the properties shall not be forfeited to the Government.

[3] The respondents in these appeals are the third parties who responded to the notice. Both the appellant and the respondents filed affidavits to contest the application.

[4] On 27 August 2021, the Sessions Court dismissed the forfeiture application by the Public Prosecutor. The learned Sessions Judge went on to hold that in view of the dismissal, s. 61 does not empower her to adjudicate the respondents' claims. Dissatisfied, the prosecution and the respondents lodged their respective appeals to the High Court against the aforesaid decisions.

[5] On 29 April 2022, the High Court Judge ("the judge") having considered the arguments found that the Sessions Judge had not decided on the respondents' claims and did not specify in her decisions whether the said claims were allowed or dismissed.

[6] Consequently, in respect of the respondents' appeals the High Court:

(i) exercised its revisionary powers under s. 31 of the Courts of Judicature Act 1964, and s. 325 of the Criminal Procedure Code to remit the respondents' claims to the Sessions Court for adjudication; and

(ii) dismissed the respondents' appeals without prejudice to their right to re-file an appeal against the Sessions Court decision in respect of their claims.

[7] In respect of the prosecution's appeal, the High Court stayed the prosecution's appeal until the respondent's claims are adjudicated by the Sessions Court.

[8] On 11 May 2022, the appellant lodged the instant appeal against the High Court decision to remit the respondents' claims to the Sessions Court for adjudication.

Submissions

[9] It is the appellant's contention that under s. 61, the court is required to adjudge the claims of third parties only if and when the prosecution succeeds in its forfeiture application. It says that as the prosecution's forfeiture application in the instant case was dismissed by the Sessions Judge, it was not incumbent upon the court to deal with the respondents' claims. It argues that the judge consequently erred in remitting the respondents' claims to the Sessions Court for adjudication when the prosecution failed to prove that the subject matter of the forfeiture application are forfeitable properties.

[10] Conversely, the respondents contend that their claims are separate and independent of the prosecution's forfeiture application. They say that the opening words of s. 61 makes it clear that the dismissal of the forfeiture application does not take away or detract from their rights to have their claims adjudicated by the Sessions Court.

Statutory Provisions

[11] Before we consider the rival submissions before us, it is convenient to set out the statutory provisions relevant to the appeal. They are:

> Section 55
>
> (1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make and an order for the forfeiture of any property which is proved to be:
>
> (a) The subject-matter or evidence relating to the commission of such offence;
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> (b) Terrorist property;
>
> (c) The proceeds of an unlawful activity; or
>
> (d) The instrumentalities of an offence,
>
> Where:
>
> (aa) the offence is proved against the accused; or
>
> (bb) the offence is not proved against the accused but the court is satisfied that:
>
> (i) The accused is not the true and lawful owner of such property; and
>
> (ii) No other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, diminished in value or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a civil debt due to the Government of Malaysia and shall not be subject to any period of limitation prescribed by any written law.

(3) In determining whether the property is:

(a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

The court shall apply the standard of proof required in civil proceedings.

Section 61

(1) The provisions in this Part shall apply without prejudice to the rights of *bona fide* third parties.

(2) The court making the order of forfeiture under subsection 28L(1) or section 55 or the judge to whom an application is made under subsection 28L (2) or 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that:

(a) the claimant has a legitimate legal interest in the property;

(b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or Part IVA or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

Whether Third Parties' Claims Can Be Adjudicated Under s. 61 Before A Forfeiture Order Is Made

[12] This is not the first time that this question has been raised in the Malaysian courts. It has come under the scrutiny of the court in several cases. In *PP v. Thong Kian Oon & Ors* [2012] 8 CLJ 119, Ghazali Cha J stated:

> Based on the evidence adduced by learned DPP, I am of the opinion that the evidence adduced is insufficient to satisfy me that the properties are the subject matter of or was used in the commission of an offence under sub-s. 4(1) of the Act. As such the application for the forfeiture order against all the respondents are dismissed. As such, notice under s. 61 of the Act is premature. Section 61 only comes into play when the court makes the order of forfeiture under s. 56 of the Act. Therefore, the application for forfeiture is dismissed and all the properties must be released immediately to the respondents respectively.

[13] In *PP v. Mohd Bakri Samsu & Anor* [2016] 5 CLJ 824, Noorin Badaruddin J opined the same view:

> In the upshot, based on the affidavits and exhibits, this court found that the applicant failed to establish on balance of probabilities that the properties seized from the respondents were the subject matter of or was used in the commission of an offence under sub-s. 4(1) of the Act. As such the application for the forfeiture order was denied. Consequently, the notice under s. 61 of the Act is premature. Section 61 only comes into play when the court makes the order of forfeiture under s. 56 of the Act.

[14] Thereafter, in *Azmi Osman v. PP & Another Appeal* [2015] 9 CLJ 845; [2016] 3 MLJ 98, this court on the same issue explained as follows;

> We agree with the learned SCJ that the prosecution had proven on the balance of probability that the properties in question are proceeds of an unlawful activity which constitutes the subject matter of the offence. *As the SCJ was the court making the order of forfeiture under s. 55 at the end of a prosecution that had resulted in a conviction of the accused, it was incumbent upon the SCJ to issue the third party notice under s. 61 of the AMLATFA before any final order on forfeiture can be made in respect the said properties.* We are in agree with the learned SCJ that the evidence led in this case would necessitate the giving of the notice to third parties by way of publication in the gazette who may then stake their claims by proving themselves to be *bona fide* owners of the seized monies, in which case the monies shall be returned to them. But if they fail to prove that they are entitled to the seized properties, then the monies shall be ordered to be forfeited to government revenue ... We agree with learned deputy that a forfeiture order is subject to giving prior notice to third parties as is clearly borne out in the wordings to s. 55(1) of the AMLATFA itself. *Indeed, in this case, no forfeiture order had been made by the learned SCJ and there is basis for her to issue the statutory notice in order to facilitate the process pertaining to the eventual forfeiture of the seized properties which are the subject-matter of the offence before her.* We therefore see

no merit in the complaint of the accused person in regard to the issue of the notice under s. 61 of the AMLATFA. On account of the above, the appeal by the accused person against the order on the s 61 notice under AMLATFA is dismissed. (emphasis added)

[15] However, in *PP lwn. Taiko Fertiliser & Yang Lain* [2019] 4 CLJ 480, this court expressed a different view on the issue. There, the ('the prosecution') sought two orders, the first to publish a notice in the *Gazette* to call upon any third parties who claimed to have any interest in the seized moveable properties to appear before the court to show cause; and the second, the forfeiture of the moveable properties. The High Court only dealt with the forfeiture application and dismissed it. It did not deal with the prayer for an order to publish a notice in the *Gazette*. The prosecution appealed.

[16] The prosecution submitted that the trial judge should not have heard the forfeiture application without first ordering for the notice in the *Gazette* to be published as mandated by s. 61(2) of the Act. The respondents argued that before the mechanism under s. 61(2) of the Act could be generated, the trial judge must first decide whether the prosecution's application for a forfeiture order under s. 56(1) of the Act bore any merits. In other words, the trial judge must first issue an order of forfeiture before the procedure under s. 61(2) of the Act could be exercised. The Court of Appeal rejected the respondent's submission and explained:

Kami bersetuju dengan penghujahan TPR bahawa hanya satu isu sahaja yang harus kami tentukan dalam rayuan ini iaitu sama ada hakim bicara dikehendaki di bawah s. 61(2) untuk mempertimbangkan terlebih dahulu permohonan untuk disiarkan satu notis dalam Warta sebelum mempertimbangkan sama ada harta-harta yang disenaraikan dalam notis usul berkenaan wajar dilucut hak atau tidak di bawah s. 56, AMLATFPUA 2001.

Harus juga dicatatkan bahawa ungkapan "subject to s. 61" di bawah s. 56(1) itu merujuk s. 61 secara keseluruhan dan bukan sekadar s. 61(2) sahaja. Berdasarkan kes *Chandavarkar Sita Ratna Rao*, *supra*, keseluruhan peruntukan s. 61 khususnya s. 61(2) hendaklah diberikan keutamaan terlebih dahulu. Keabsahan (validity) takrifan ini diperkukuhkan dengan penggunaan ungkapan "... the judge to whom an application is made under ... s. 56(1) shall cause to be published a notice in the *Gazette* ..." dalam s. 61(2) itu sendiri. Dalam hal ini, kami bersetuju dengan hujahan TPR bahawa dengan penggunaan perkataan "shall" dalam s. 61(2) itu menjadikannya satu kehendak yang wajib diikuti sebelum sesuatu perintah pelucuthakkan di bawah s. 56 dibuat oleh hakim.

[17] Lastly, in the Federal Court case of *Tetuan Wan Shahrizal, Hari & Co v. PP* [2023] 4 CLJ 843; [2023] 4 MLJ 1, Mary Lim FCJ observed:

> In considering whether or not to grant the order of forfeiture, the High Court is mandatorily obliged under s 61(1) to cause to be published a notice in the *Gazette* 'calling upon any third party who claims to have any interest in the property to attend before the Court on the date specified in the notice to show cause as to why the property shall not be forfeited'. This is regardless whether there is prosecution for an offence under the Act – see ss 55(1) and 56(1).
>
> However, it must not be over looked that the forfeiture proceedings are principally between the PP and the accused, Amar, as s. 61 is only engaged where there are third parties laying some claim or interest in the properties seized. If there are none, the proceedings will proceed only between these two key players. This position must be properly appreciated because it appears to have been overlooked simply because the two applications, by PP and by the third parties, were heard together. Hence, in the proceedings at the High Court, affidavits were filed by Amar in protest of the forfeiture orders sought by the PP.
>
> I pause here to make this observation. As pointed out a moment ago, the PP must satisfy the High Court that the property is of any of the character or nature prescribed in s 56(1)(a) to (d). **It is only upon satisfying the High Court that the property is liable to be forfeited and thereafter, the High Court deals with the rights or interests of any third parties.** As held in *Public Prosecutor v. Kuala Dimensi Sdn Bhd & Ors*, s. 56 does not absolve the PP from proving on a balance of probabilities that the properties seized come under the purview of the Act and were procured or are the proceeds of an unlawful or illegal activity. The PP must prove on a balance of probabilities that the properties seized were procured in connection with the commission of the predicate offence or are of the character for which the order for seizure was issued. See also *Public Prosecutor v. Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763; [2016] AMEJ 0162. (emphasis added)

[18] The foregoing cases exemplify that no order for forfeiture can be made until the claims of third parties to the seized properties is heard, and to establish its rights to forfeiture, the prosecution must, first, prove that the properties it seeks to forfeit are forfeitable properties, namely, that they are the subject matter or evidence relating to the commission of the offence under s. 4(1) of the Act.

[19] It is only upon the prosecution establishing that the seized properties are forfeitable properties, that the court enters a preliminary forfeiture order. And, it is only upon the making of the preliminary forfeiture order is the court required to publish the requisite notice in the *Gazette* under s. 61(2) of the Act to commence the ancillary proceedings to determine the rights of the third parties to the forfeited properties. This stands to reason as it cannot be gainsaid that it would be an absolute waste of judicial time if the forfeiture

application and the claims of the third parties are heard simultaneously and, at the conclusion of the proceedings it is found that the properties are not forfeitable properties.

[20] It bears mention that the Government does not have a clear title to the property until the ancillary proceedings under s. 61 is concluded. It is only upon the adjudication of the third parties claims, that the preliminary forfeiture order can be made final.

[21] For the reasons given, we are unable to share the judge's view that the Sessions Court ought to have proceeded with the ancillary proceedings in respect of the respondents' claims on dismissing the forfeiture application. The learned judge erred in holding that the ancillary proceedings under s. 61 is separate and independent from the forfeiture application. The mechanics of the ancillary proceedings must follow the procedure laid down in ss. 55, 56 and 61 of the Act.

[22] We therefore allow the appeal and set aside the order of the High Court to remit the respondents' claims to the Sessions Court and reinstate the respondents appeals. We further direct that the High Court first hears the prosecution's appeal against the dismissal of its forfeiture application by the Sessions Judge. If the said appeal is dismissed and the decision of the Sessions Court is affirmed, it would follow that the respondents/third party claimants' appeals would fail without prejudice to the respondents/third party claimants' rights to institute separate civil proceedings against the appellant in respect of their respective legal rights to the properties in question. However, if the appeal is allowed, then the respondents' claims would be remitted to the Sessions Judge for adjudication in accordance to the provisions of the Act.